Ng Say Chuan (h) v Lim Szu Ling (w) and another application

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS S8–24–156 OF 2008 AND S8–24–143 OF 2008
YEOH WEE SIAM JC
18 MARCH 2010

Family Law — Children — Custodianship — Application by husband for custody of children — Mother granted interim custody — Rebuttable presumption that custody of child aged below seven years to be given to mother — Whether presumption rebutted by husband — Whether in best interest of children to be brought up together by mother — Law Reform (Marriage and Divorce) Act 1976 s 88(2) & (3)

Family Law — Divorce — Consent order made — Application to vary interim consent order — Interim consent order for custody and maintenance of children — Discretion of court to vary interim order — Whether material change in circumstances shown — Law Reform (Marriage and Divorce) Act 1976 s 96

Family Law — Financial obligation — Maintenance — Duty of parent to maintain children — Regard to be had to his or her means or station in life — Primary responsibility for maintenance lying on husband — Husband claiming to be unemployed — Whether proven husband to have means to pay maintenance — Law Reform (Marriage and Divorce) Act 1976 s 92

Two originating summonses ('encl 1') and ('encl 15') were jointly heard. Enclosure 15 was an application by the plaintiff (husband), inter alia, for orders that: (a) the interim order dated 15 January 2009 ('the interim order') be suspended or varied; (b) the husband stops paying interim maintenance of RM4,500 per month commencing April 2009; and (c) the husband be given the care, custody and control ('custody') of the three children from the marriage. The interim order was a consent order entered into by the husband and wife where it was agreed that the custody of the three children be given to the wife with access given to the husband, and a monthly maintenance of RM4,500 per month be credited by the husband into the wife's bank account each month. The husband claimed that he had been constructively dismissed and was not working for about ten months now. According to the husband, his monthly expenditure was more than RM19,000 per month whereas his sole income was from the rental of RM4,100 per month from his house. The husband also claimed that he now had free time to give his full attention to

A the children. The defendant ('wife') contended that there was a possibility that the plaintiff was still working and getting an income with one of his companies called Penggiran. She also claimed that the plaintiff was receiving rental from a house in Melbourne and that the plaintiff had savings and was also a shareholder and director of several companies. Enclosure 1 was an B application by the wife, inter alia, for custody and maintenance for the children. The wife claimed that the husband was having an affair with another woman and that he had abandoned his responsibility towards the wife and children. The husband on the other hand claimed that the wife was having an affair with another man and that she was addicted to smoking and C mahjong.

Held, allowing encl 1 and dismissing encl 15 with costs:

D (1) A consent order must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the court. Applying s 96 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), the court has the discretionary power to vary the interim order for custody or maintenance of the children if there is any 'material change in the E circumstances' (see para 12).

(2) Under s 92 of the Act, it is the duty of a parent to maintain his children, whether they are in his or her custody or the custody of any other person by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means F or station in life or by paying the cost thereof. The husband has the primary responsibility, whereas the wife has a secondary responsibility, to maintain the children (see paras 15–16).

(3) From the husband's statement of income and liabilities, the husband's G only income was RM4,100 from the rental of the house. However, his nett expenses were RM19,192.51, therefore a deficit of RM15,092.51 a month. The question that the husband did not answer was, where did he manage to get the money to cover his extra expenses of RM15,092.51 a month. He stated that he had to use his savings to pay H for his expenses. Thus, it was clear that the husband did have the means to pay the monthly maintenance of RM4,500 under the interim order. The husband also did not rebut the wife's allegation that he was collecting rent from his Melbourne apartment (see paras 22–23).

I (4) From the husband's expenditure, it was clear that he was living quite luxuriously. It is morally and legally wrong for a father not to maintain his three children, ages ten, eight and six, when he was using his income, savings and resources to take care of himself solely, without any regard to his paternal and statutory duty to maintain his children. The

husband should also have been more careful in claiming constructive dismissal from a job that paid him RM35,000 a month (see paras 24–25).

(5) As for the husband's application for custody of the three children, the paramount consideration for determining custody under s 88(2) of the Act shall be the welfare of the child. Regarding the girl, there is a rebuttable presumption under s 88(3) of the Act, that the custody of any child below the age of seven years shall be given to the mother. On the facts, the presumption in s 88(3) had not been rebutted by the husband. It was undesirable to disturb the lives of the children by a change of custody. It was in the welfare and interest of the three children that they be brought up together by the wife (see paras 29, 31, 34–35 & 37).

(6) There is no material change in the circumstances to necessitate a variation of the interim order for maintenance and custody of the three children (see para 40).

[Bahasa Malaysia summary

Dua saman pemula ('lampiran 1') dan ('lampiran 15') telah didengar bersama. Lampiran 15 adalah permohonan oleh plaintif ('suami'), antara lain, untuk perintah-perintah bahawa: (a) perintah interim bertarikh 15 Januari 2009 ('perintah interim tersebut') digantung atau diubah; (b) suami berhenti membayar nafkah interim RM4,500 sebulan bermula April 2009; dan (c) suami diberikan hak jagaan dan kawalan ('hak penjagaan') ke atas ketiga-tiga anak hasil perkahwinan. Perintah interim adalah perintah persetujuan yang ditandatangani oleh suami isteri di mana telah dipersetujui bahawa hak penjagaan ketiga-tiga anak tersebut diberikan kepada isteri dengan hak melawat diberikan kepada suami, dan nafkah bulanan RM4,500 dikreditkan oleh suami ke dalam akaun bank isteri setiap bulan. Suami mendakwa bahawa dia telah dipecat secara konstruktif dan kini sudah tidak bekerja selama lebih kurang sepuluh bulan. Menurut suami, perbelanjaan bulanannya melebihi RM19,000 sebulan manakala satu-satunya pendapatannya adalah daripada sewa RM4,100 sebulan daripada rumahnya. Suami juga mendakwa bahawa dia sekarang mempunyai masa lapang untuk memberikan sepenuh perhatiannya kepada anak-anak tersebut. Defendan ('isteri') menegaskan bahawa terdapat kemungkinan yang plaintif masih bekerja dan mendapat pendapatan dengan salah satu daripada syarikatnya yang dipanggil Penggiran. Dia juga mendakwa bahawa plaintif menerima sewa dari sebuah rumah di Melbourne dan plaintif mempunyai simpanan dan juga merupakan pemegang saham dan pengarah beberapa buah syarikat. Lampiran 1 adalah permohonan oleh isteri, antara lain, untuk hak penjagaan dan nafkah anak-anak tersebut. Isteri mendakwa bahawa suami mempunyai hubungan sulit dengan wanita lain dan bahawa dia telah mengabaikan tanggungjawabnya terhadap isteri dan anak-anak. Suami sebaliknya

mendakwa bahawa isteri mempunyai hubungan sulit dengan lelaki lain dan bahawa dia kaki merokok dan mahjung.

Diputuskan, membenarkan lampiran 1 dan menolak lampiran 15 dengan kos:

(1) Perintah persetujuan tidak sepatutnya diusik kecuali jika terdapat keadaan luar biasa yang mewajarkan campur tangan mahkamah. Dengan menggunapakai s 96 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta'), mahkamah mempunyai kuasa budi bicara untuk mengubah perintah interim untuk hak penjagaan atau nafkah anak-anak jika terdapat apa-apa 'material change in the circumstances' (lihat perenggan 12).

(2) Di bawah s 92 Akta, ibu bapa mempunyai kewajipan untuk memberi nafkah anak-anaknya, sama ada mereka dalam jagaan bapa atau ibu atau jagaan orang lain dengan memberi mereka tempat tinggal, pakaian, makanan dan pendidikan sebagaimana yang munasabah dengan mengambilkira sumber atau kedudukannya dalam kehidupan bapa atau ibu itu atau dengan membayar kosnya. Suami mempunyai tanggungjawab utama manakala isteri mempunyai tanggungjawab sekunder untuk memberi nafkah anak-anak tersebut (lihat perenggan 15–16).

(3) Berdasarkan penyata pendapatan dan liabiliti suami, satu-satunya sumber pendapatan suami adalah RM4,100 daripada sewa rumah. Walau bagaimanapun, perbelanjaan bersihnya adalah RM19,192.51, iaitu defisit RM15,092.51 sebulan. Persoalan yang tidak dijawab oleh suami adalah dari mana dia mendapat wang untuk menampung perbelanjaan lebihan RM15,092.51 sebulannya. Dia mengatakan bahawa dia telah menggunakan simpanannya untuk membayar perbelanjaannya. Oleh itu, jelas bahawa suami memang mempunyai sumber untuk membayar nafkah bulanan RM4,500 di bawah perintah interim itu. Suami juga tidak mematahkan pengataan isteri bahawa dia mengutip sewa dari apartmennya di Melbourne (lihat perenggan 22–23).

(4) Berdasarkan perbelanjaan suami, jelas bahawa dia hidup agak mewah. Dari segi moral dan undang-undang adalah salah seorang bapa tidak memberi nafkah kepada tiga orang anaknya, berumur sepuluh, lapan dan enam, sedangkan dia menggunakan pendapatan, simpanan dan sumbernya untuk menjaga dirinya sahaja, tanpa menghiraukan kewajipan statutorinya dan sebagai seorang bapa untuk memberi nafkah kepada anak-anaknya. Suami juga patut lebih berhati-hati menuntut pemecatan konstruktif daripada pekerjaan yang membayarnya RM35,000 sebulan (lihat perenggan 24–25).

(5) Memandangkan permohonan suami untuk hak penjagaan terhadap ketiga-tiga kanak-kanak tersebut, pertimbangan utama untuk menentukan hak penjagaan di bawah s 88(2) Akta sepatutnya adalah kebajikan anak itu. Berhubung anak perempuan itu, terdapat andaian yang boleh dipatahkan di bawah s 88(3) Akta bahawa hak penjagaan mana-mana kanak-kanak di bawah umur tujuh tahun hendaklah diberikan kepada ibu. Berdasarkan fakta, andaian dalam s 88(3) tidak dipatahkan oleh suami. Gangguan dalam kehidupan kanak-kanak tersebut adalah suatu yang tidak diingini oleh sebab perubahan hak penjagaan. Adalah demi kebajikan dan kepentingan ketiga-tiga kanak-kanak tersebut agar mereka dibesarkan bersama oleh isteri (lihat perenggan 29, 31, 34–35 & 37).

(6) Tiada perubahan besar dalam keadaan tersebut sehingga memerlukan perubahan perintah interim untuk nafkah dan hak penjagaan ketiga-tiga kanak-kanak tersebut (lihat perenggan 40).]

Notes

For cases on consent order made, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3257–3259.

For cases on custodianship, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2984–3077.

For cases on maintenance, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3484–3514.

Cases referred to

B Ravandran s/o Balan v Maliga d/o Mani Pillai [1996] 2 MLJ 150, HC (refd)

K Shanta Kumari v Vijayan [1986] 2 MLJ 216, HC (refd)

Lau Hui Sing v Wong Chuo Yong (f) [2008] 5 MLJ 846; [2008] 9 CLJ 232, HC (refd)

Mahabir Prasad v Mahabir Prasad [1982] 1 MLJ 189; [1981] 1 CLJ 182, FC (refd)

Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah [2000] 6 MLJ 48; [2000] 3 CLJ 175, HC (refd)

Tan Chong Pay v Tan Swee Boon [1997] MLJU 50; [1997] 4 CLJ 625, HC (refd)

Teh Eng Kim v Yew Peng Siong [1977] 1 MLJ 234, FC (refd)

W v H [1987] 2 MLJ 235, HC (refd)

YCC @ JCC v LSY [2006] 7 MLJ 137; [2006] 7 CLJ 207 (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 88(2), (3), 93(1), (2), 96

LY Oon (LY Oon & Associates) for the plaintiff husband.
YN Foo (YN Foo & Partners) for the defendant wife.

Yeoh Wee Siam JC:

INTRODUCTION

[1] This is an appeal filed on 25 February 2010 by Ng Say Chuan, the plaintiff husband ('the husband') against my decisions made on 28 January 2010 in respect of the joint hearing of:

(a) Case No OS S8–24–156 of 2008 regarding encl 1 ('encl 1');

(b) Case No OS S8–24–143 of 2008 regarding encl 15 ('encl 15').

[2] I heard both parties regarding encl 15 first, followed by encl 1.

ENCLOSURE 15

[3] This is an application by the husband for the following prayers:

(a) the interim order of the court dated 15 January 2009 ('the interim order') be suspended or varied;

(b) the husband stops paying interim maintenance of RM4,500 per month commencing April 2009;

(c) the wife pays interim maintenance of RM5,000 a month to the husband commencing April 2009;

(d) the husband be given the care, custody and control ('custody') of the three children from the marriage;

(e) reasonable access of the children be given to the wife;

(f) costs in the cause; and

(g) any other relief as the court deems fit.

[4] The grounds for the application are as follows:

(a) the husband is now unemployed;

(b) month whereas his sole income is from the rental of RM4,100 per month from his house. Therefore, the husband is unable to pay the interim maintenance of RM4,500 per month to the wife;

(c) the husband now has free time to give his full attention to the children. Therefore, the custody of the three children should be given to the husband with reasonable access given to the wife.

[5] The husband submitted that he was constructively dismissed and was not working for about ten months now. Before he stopped work, he was earning about RM11,740 a month. The husband now only has an income of RM4,100 per month from the rental of a house in Bukit Bandaraya.

[6] The defendant wife ('the wife') contended that it is impossible for the husband not to work for nearly ten months. She stated that there is a possibility that the husband is working and getting an income with one of his companies, namely Penggiran Asia Sdn Bhd ('Penggiran') which was not disclosed by him. The husband has other sources an income, for example:

(a) rent of RM4,100 per month from the Bukit Bandaraya house;

(b) current account No 21413800040059 in RHB Bank which has a balance of RM419,784.67 in January 2008. Until now the husband has not given any other evidence even though challenged by the wife;

(c) rent from the house in Melbourne; and

(d) the husband is a shareholder and director of several companies including Penggiran.

[7] The wife further contended that the husband is still maintaining a luxurious lifestyle including employing a domestic maid and a gardener, and using a car ie Hyundai Trajet WJC 7890 and a second car ie Mazda Premacy WLS 3689.

[8] The interim order is a consent order entered into by the husband and wife where it was agreed that the custody of the three children be given to the wife with access given to the husband, and a monthly maintenance of RM4,500 per month be credited by the husband into the wife's bank account each month. It is not stated whether the RM4,500 per month is for maintenance of the children or the wife but it can be safely concluded that it is maintenance for the children since there is no proof of any divorce proceedings being filed or a divorce being granted to warrant maintenance for the wife to be paid.

[9] After considering the submissions of both parties I made the following decision on encl 15:

(a) Prayers (a), (b), (c), (d) and (e): dismissed.

(b) Prayer (f): costs to be borne by the husband.

[10] My grounds for the decision are as follows:

[11] Section 96 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') provides as follows:

> 96 Power for court to vary orders for custody or maintenance
> The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

[12] Bearing in mind again that the interim order is a consent order, it therefore must be honoured and complied with by both parties. As far as possible, a consent order must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the court (see *Lau Hui Sing v Wong Chuo Yong (f)* [2008] 5 MLJ 846; [2008] 9 CLJ 232). In this case, however, learned counsel for the wife informed the court that the husband has not complied with the interim order and has not paid the monthly maintenance agreed upon and has been in arrears of payment of RM45,000 up to the date of hearing. Applying s 96 of the Act to the case, the court has the discretionary power to vary the interim order for custody or maintenance of the children if there is any 'material change in the circumstances'.

Whether there is a material change in circumstances regarding maintenance and custody of the children

[13] Learned counsel for the husband, inter alia, submitted that the husband has been constructively dismissed and has been out of job for ten months. That is why the husband has to apply for a variation of the interim order. Payment of the loan for his house in Taman Tun Dr Ismail ('TTDI') is RM5,000 a month. The wife is a joint owner of the house and she is working, but the husband has to take out from his savings to pay for the loan. The husband is merely asking for a stay of the interim order.

[14] On the other hand learned counsel for the wife submitted that the husband, a qualified engineer, who was earning RM35,000 a month, was not dismissed by his employer, but instead abandoned his job and claimed constructive dismissal. The husband did not give proof of his efforts to find another job.

[15] Under s 92 of the Act, it is the duty of a parent to maintain his or her children, whether they are in his or her custody or the custody of any other person by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means or station in life or by paying the cost thereof.

[16] It is trite law that the husband has the primary responsibility, whereas the wife has a secondary responsibility, to maintain the children (see also s 93(1) and (2) of the Act).

[17] I note from the husband's affidavit that the wife earns about RM11,000 a month. I also note that in encl 1 the wife is praying for a maintenance of RM15,598 per month for the children. The RM4,500 a month for maintenance of the children under the interim order is therefore less than one-third of what the wife is praying for.

[18] In this case, the husband has also admitted in his affidavit that even in the past he had never intended the wife to be the sole bread winner of the family. The husband does not dispute that he is receiving a steady monthly rental from the Bukit Bandaraya house. The wife has exhibited proof that the husband's current account in the RHB Bank had a balance of RM419,784.67. The wife contended that the husband is also receiving rental income from his Melbourne apartment.

[19] The husband has exhibited the details of his total monthly expenditure of RM19,192.51 (exh C under exh B of the husband's affidavit in support of the application ('exh C')) but he did not disclose his total assets.

[20] In *YCC @ JCC v LSY* [2006] 7 MLJ 137; [2006] 7 CLJ 207, Clement Skinner J stated as follows:

> First, the husband carries the evidential burden of satisfying the court, on a balance of probabilities, that there is a material change of circumstances.

[21] In *Lau Hui Sing v Wong Chuo Yong (f)*, the court dismissed an application made by the ex-husband seeking an order for the wife to contribute maintenance for the three children on the ground that the ex-husband had not disclosed his assets, movable and immovable.

[22] From the husband's statement of income and liabilities (exh C), the husband's only income is RM4,100 from the rental of the Medang Kapas house. However, his nett expenses are RM19,192.51. He therefore has a deficit of RM15,092.51 a month? The question that the husband did not answer is, where did he manage to get the money to cover his extra expenses of RM15,092.51 a month? He stated that he had to use his savings to pay for his expenses, but he did not disclose what are his savings. He did not show proof that the RM419,784.67 in his RHB Bank account is no longer available, which means such monies are still at his disposal. That being the case, it is clear that the husband does have the means to pay the monthly maintenance of RM4,500 under the interim order.

[23] The husband did not rebut the wife's allegation that he was collecting rent from his Melbourne apartment. The logical deduction is that he does have such rental income from such apartment.

[24] From exh C, the husband spends RM500 on clubs, RM200 on a gardener, RM350 on a part time maid, RM4,000 on personal expenses, RM1,200 on groceries and household items, RM1,014.23 on utilities and other expenses. From the husband's expenditure, it is clear that he is living quite luxuriously, more so when he does not deny that he has two cars. He admitted that he even had a driver. It is morally and legally wrong for a father not to maintain his three children, ages ten, eight and six, when he is using his income, savings and resources to take care of himself solely, without any regard to his paternal and statutory duty to maintain his children. He does not appear to have made any efforts to cut down on his expenses or lifestyle or to tighten his belt. He could have liquidated some of movable or immovable assets but he did not do so. Out of the husband's total expenses of RM19,192.51 per month, only RM4,158 is for the children's Sri Cempaka school fees, but the balance of RM15,034.51 is for the husband's personal expenditure or commitments.

[25] With such a high expenditure every month, the husband should have been more careful in claiming constructive dismissal from a job that pays him RM35,000 a month. Constructive dismissal is not a direct dismissal by the employer. Constructive dismissal is one where the employee leaves his job or employment claiming that the employer has breached his contract of employment in a fundamental manner and the employee gives notice to the employer that he is claiming constructive dismissal on that ground. Here, learned counsel for the wife submitted that the husband deliberately and irresponsibly created his current jobless situation by walking out on his job when he was not even directly dismissed by his employer (see letter from U Mobile dated 26 March 2009, exh 'LSL2' to the wife's affidavit on 14 May 2009).

[26] The husband should have thought twice before initiating his constructive dismissal, bearing in mind that he has his moral and legal duty to maintain his children. It is common knowledge that one need not be dismissed if the employer did not take any direct steps to dismiss him. Thus, one can time one's own constructive dismissal or decide not to claim it at all. The husband therefore cannot walk out on his job, show no proof of his efforts to look for a job in the last ten months and then applies to this court to suspend the interim order and stop payment of maintenance for the three children.

[27] The husband also did not deny the wife's allegation that he is now working in one of his own companies, Penggiran. A

[28] As for the husband's claim for interim maintenance of RM5,000 a month from his wife, I am of the opinion that this is mischievous and vexatious. There is no divorce petition filed, so there is no question of the wife being ordered to pay maintenance to the husband. B

[29] As for the husband's application for custody of the three children on the ground that he now has time to take care of them, I state here that the paramount consideration for determining custody under s 88(2) of the Act shall be the welfare of the child even though the court shall have regard to the wishes of the parents of the child, and the wishes of the child where he or she is of an age to express an independent opinion. C

[30] The three children are two boys of ages ten and eight years respectively, and a girl of age six years ie their current ages. D

[31] Regarding the girl, there is a rebuttable presumption under s 88(3) of the Act, that enhances the natural law, that the custody of any child below the age of seven years shall be given to the mother. E

[32] Section 88(3) of the Act provides as follows:

> 88(3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody. F

[33] There is a long line of authorities deciding that the mother should be entitled to custody of a child during what is called the period of nurture, until the child attains seven years (see *K Shanta Kumari v Vijayan* [1986] 2 MLJ 216; *W v H* [1987] 2 MLJ 235; *B Ravandran s/o Balan v Maliga d/o Mani Pillai* [1996] 2 MLJ 150; *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234; *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* [2000] 6 MLJ 48; [2000] 3 CLJ 175; *Tan Chong Pay v Tan Swee Boon* [1997] MLJU 50; [1997] 4 CLJ 625; and *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189; [1981] 1 CLJ 182). G H

[34] On the facts, regarding the six year old girl, Claire, the presumption in s 88(3) has not been rebutted by the husband and therefore custody of this child should remain with the mother. I

[35] Regarding the custody of the three children as whole, as submitted by learned counsel for the wife, by virtue of the interim consent order, the husband had agreed, and the wife did have the custody of the children for the last one year. I considered the undesirability of disturbing the lives of these children by a change of custody. It is in the welfare and interest of the children to maintain stability in their lives.

[36] The children have, from birth, been used to the environment in the maternal grandmother's home, having been cared for in that home during the day even when their parents were together and this continuity of care should be preserved.

[37] There is no reason to separate the three children as they have been always together. It is in the welfare and interest of the three children that they be brought up together by the wife.

[38] Both husband and wife have alleged infidelity or adultery on each other's part. It appears that the marriage has suffered bad blows from it. Based on whatever is disclosed in the affidavits of both parties, I do not think that the welfare of the children would be adversely affected or jeopardised if custody is given to the mother.

[39] As for the husband's present situation of being unemployed, it is merely temporary and does not justify a new order by this court to hand over the custody of the children to him since there is a real possibility of him getting a job soon, after which he may not have time to take care of the children anymore.

[40] For the above reasons I am satisfied that there is no material change in the circumstances to necessitate a variation of the interim order for maintenance and custody of the three children. Accordingly, I dismissed the application in encl 15 with costs.

ENCLOSURE 1

[41] The application in encl 1 was filed by the plaintiff wife ('the wife') for the following orders:

(a) the wife is to be given the sole rights for care, custody and control ('custody') of the three children of the marriage ie Nigel Ng Chong Wui (boy, nine years old), Nicholas Ng Chong Hau (boy, seven years old) and Claire Ng Kim Yuen (girl, five years old) (note: the ages of the children stated here are their ages at the time of filing of the application);

(b) the defendant husband ('the husband') be given reasonable access; A

(c) the husband pays maintenance of RM15,958 per month for the children;

(d) the husband pays for all education expenses of all the children;

(e) the husband pays for all the medical and dental costs of the said children; and B

(f) the husband pays for all the costs of these proceedings.

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[42] The grounds for the application (encl 2) are as follows:

(a) the husband is having an affair with a woman called Caroline Kan Sau Lai;

(b) the husband had abandoned his responsibility towards the wife and children; D

(c) in the interest and for the welfare of the children, the wife had to leave the matrimonial home;

(d) in the interest and for the welfare of the children, the wife should be given custody of the said children; and E

(e) the husband is a person of means.

[43] The husband filed an affidavit in reply (1) on 14 January 2009 (encl 4) and, inter alia, stated: F

(a) the breakdown of the relationship between the husband and wife resulted from the dishonesty of the wife who had an affair with another man;

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(b) the wife is addicted to smoking and mahjong, and does not know how to cook, and this has jeopardised the lives of the children; and

(c) the husband is ready to take care of the children because he is able, and has a domestic maid and a personal driver.

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[44] Both learned counsel adopted the same written submissions that they had filed for encl 15.

[45] Accordingly, I made the following decision on encl 1: I

(a) Prayers 1 and 2: allowed.

(b) Prayer 3: dismissed. The original maintenance of RM4,500 per month for the three children is maintained.

(c) Prayers 4 and 5: the husband is to pay 50% of all costs for the education, and medical and dental treatment of the three children.

(d) Prayer 6: costs to borne by the respective parties.

[46] My decision for encl 1 is consequential upon my considerations and decision for encl 15. My grounds of judgment for encl 1 are the same as those for encl 15. That being the case, my grounds of judgment for encl 15 above are to apply mutatis mutandis here.

Enclosure 1 allowed and encl 15 dismissed with costs.

Reported by Kanesh Sundrum